NO. 85-732

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC,; FRONTIER AIRLINES, INC,; AND OZARK AIR LINES, INC.,

Appellants,

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, et al.,

Appellees.

On Appeal from the Supreme Court
Of the State of South Dakota

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Section 7(d) of the Airport Development Acceleration Act of 1973 (49 U.S.C. §1513(d)) forbids a state to assess or tax air carrier transportation property at ratios or rates higher than those imposed on other "commercial and industrial property of the same type." The Act defines "commercial and industrial property" to include property "devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. §1513(d)(2)(D). Does this definition permit a state to escape §1513(d)'s prohibition by wholly exempting business personal property from taxation, while simultaneously imposing a tax on air carrier transportation property?

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Pursuant to Rule 16, paragraph 1(b) and 1(d) of the Revised Rules of this Court,

Appellees move that this appeal be dismissed or, alternatively that the Judgment of the Supreme Court of South Dakota dated July 31, 1985, holding that the Airport Development Acceleration Act of 1973, 49 USC 1513(d) does not preempt the South Dakota airline flight property tax, be affirmed.

STATEMENT OF THE CASE

In 1961 the South Dakota Legislature enacted an airline flight property tax, South Dakota Codified Laws 10-29. This tax is based upon the valuation of aircraft allocated on factors including passenger and freight tonnage; flight time of aircraft; and revenue ton miles, each factor being the relationship of the statistics of flights within the state compared to total flights of the airline company.

At the time the Act was enacted all property, real and personal, in the state of South Dakota, other than statutory or

constitutionally exempt property such as political subdivisions or religious or charitable institutions, were subject to tax. In 1978 the personal property tax in South Dakota was repealed and this included the tax on commercial and industrial or business related personal property. Centrally assessed property, however, continued to be subject to taxation. This included, among other things, railroads, telephone, utility, gas and water companies as well as airlines. (South Dakota Codified Laws 10-4-6.1 which reads as follows:)

> "Personal property as defined in §10-4-6 which is not centrally assessed is hereby classified for ad valorem tax purposes and is exempt from ad valorem taxation. This exemption shall not impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax."

Commencing in 1978 the Congress commenced to pass anti-tax discrimination

legislation with respect to several areas of interstate commerce.

The first of these concerned railroads. PL 95-473 enacted in 1978 declared certain practices to unreasonably burden and discriminate against interstate commerce and prohibited certain actions involving the assessment of rail transportation property, now codified as 49 U.S.C. 11503. The "4R" Act.

The second law, PL 96-296 enacted in 1980 proscribed tax discrimination against motor carrier transportation property, 49 U.S.C. 11503(a).

The third enacted in 1982 PL 97-238, a part of the Airport and Airway Improvement Act of 1982, codified as 49 U.S.C. 1513(d) prohibits burdensome and discriminatory acts against air carrier transportation property.

The Appellant Airlines raised proper challenges in the administrative boards and the Courts of South Dakota and at each level their appeal was denied and the tax upheld. The South Dakota Supreme Court in its decision of July 31, 1985, Western Air Lines, Inc., et al, v. State Board of Equalization, 372 N.W.2d 106 (1985) held that it was not the intent of Congress to preclude all advalorem taxes on air carriers property and said at page 109

> "An advalorem tax which meets certain balancing requirements in relation to other commercial and industrial property would be acceptable under (d)(1), as would an "in lieu tax" wholly utilized for airport and aeronautical purposes under (d)(3)."

Each of the Federal statutes prohibiting discrimination against interstate commerce property are identical to a point. They each prohibit and declare discriminatory and a burden on interstate commerce the assessment of the property of the entity (A)

at a value that has a higher ratio to the true market value of that property than of the assessed value of other commercial and industrial property of the same type; (B) the levying of a tax on an assessment that is related to property which has a higher ratio of market value than other commercial industrial property; or (C) the levying or collecting at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

The one clear cut distinction and difference between the railroad and motor carrier and air commerce tax statutes is that Congress in 49 U.S.C. 11503(b)(4) with respect to railroads added the further proviso that a state act would unreasonably burden and discriminate against interstate commerce if it "impose(d) another tax that discriminates against a rail carrier providing transportation subject to the

jurisdiction of the commission. . . ." This broad provision does not appear in the section on discrimination against motor carrier transportation property, 49 U.S.C. 11503(a), nor does it appear in the anti-discrimination statute with respect to air commerce property. 49 U.S.C. 1513.

REASONS TO AFFIRM THE SUPREME COURT OF SOUTH DAKOTA

In its decision, the Supreme Court of South Dakota correctly applied the law of the United States with respect to the subject in question in following the authority and reasoning of the Eighth Circuit Court of Appeals in the case of Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.), cert denied, 454 U.S. 1086, 102 S.Ct. 644, 70 L.Ed. 2d, (1981). There is no question that the whole point of discrimination here is that the property of air carriers may not be taxed at a different ratio or a higher rate

than other commercial and industrial property. However the Congress has seen fit to define what constitutes commercial and industrial property in 49 U.S.C. 1513(d)(2)(D):

> "Property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; . . ." (Emphasis supplied for emphasis)

It is clear that the only property with which air commerce property is to be compared is property which is subject to a property tax levy. As already noted, personal property of other businesses except centrally assessed property in South Dakota is not subject to a property tax, therefore it is not commercial and industrial property under the Federal Act and therefore there is no basis to compare any assessment ratio or other measurement of value or tax with the tax imposed on airline flight property.

The District Court in the Ogilvie case, 492 F.Supp. 446, N.D.D.C. (1980) noted that since business property was not subject to a property levy, railroad personal property could not be compared to it in determining whether the railroad 4 R Act had been violated. However, as that Court pointed out, and as the Circuit Court of Appeals affirmed, not only were the 3 specified forms of discrimination prohibited but also "another tax that discriminates against a rail carrier. . ." Thus while there was no ratio or tax comparison which could be made, since commercial and industrial personal property was not being taxed there remained another tax which could and did discriminate, and thus the North Dakota tax scheme ran afoul of the fourth prohibition in Section 306. The same catchall clause is not contained in 49 U.S.C. 1513(d)(1). The Eighth Circuit Decision held

"The district court properly interpreted both the language and intent of §306." 657 F.2d at 221.

The Appellees believe if Congress so clearly was able to prohibit discriminatory taxes of railroads when compared to commercial and industrial property on which a tax was levied and likewise to prohibit any other discriminatory tax it was certainly capable of doing the same thing as far as air carriers were concerned. The absence of the 'any other tax concept' is clearly dispositive of this question. The South Dakota Court recognizing and applying the Ogilvie decision should be affirmed.

The Appellants have raised a spector that other more economically significant states may impose the same type of tax on airline property and on all other interstate carriers. This would be a

splendid argument if it were addressed to the Congress rather than to the Court since it was Congress which passed the anti-tax discrimination legislation and it is Congress which could make similar the restrictive provisions for air carriers as it saw fit to do for railroad property under the 4 R Act.

Appellants further argue that since the North Dakota Supreme Court decided an airline case exactly opposite to the South Dakota Court when the facts were basically the same this Court should reconcile the interpretations. Appellees submit that that is not the province of this Court so long as the South Dakota Supreme Court has properly applied the ruling of the Eighth Circuit Court of Appeals in the railroad case to a similar fact situation involving air carrier property.

CONCLUSION

For all these reasons this Court should dismiss the Appellants Appeal, or in the alternative affirm the Judgment of the South Dakota Supreme Court upholding the South Dakota airline flight property tax.

Respectfully submitted,

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